No. 96-6133

In the
Supreme Court of the United States
October Term, 1996

William Bracy,

Petitioner,

vs.

Richard B. Gramley, et al.,

Respondents.

On Writ of Certiorari To The United States
Court of Appeals for the Seventh Circuit

Brief *Amicus Curiae* of Concerned Illinois Lawyers and Law Professors in Support of Petitioner

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February 21, 1997

EDITOR'S NOTE

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STATEMENT OF INTEREST OF THE AMICI

The persons filing this amicus brief -- styled collectively as "Concerned Illinois Lawyers and Law Professors" -- are a diverse group of lawyers and law professors who practice and teach in Chicago, Illinois, and are committed to the honest administration of justice. One is a former Governor of the State of Illinois. Another is a retired Justice of the Illinois Supreme Court. Several have served in the federal or Illinois judiciary. Others have held positions of importance in local and state government. A number are former state or federal prosecutors. Some are distinguished academic lawyers. Others have risen in the practice of law. All are prominent members of the Chicago legal community.

In light of their different backgrounds, the amici have divergent views on the death penalty. Some support the institution of capital punishment. Others oppose it. Many of the amici have backgrounds in law enforcement. Others are defense oriented.

The *amici* share one common view, which prompts their joint involvement in this brief: the amici believe that the perpetration of judicial corruption, particularly in capital cases, is intolerable. The amici have witnessed at close range the erosion of public confidence that occurs when a community is faced with disclosures of official misconduct by its own elected judiciary. The *amici* believe that the restoration of lost public confidence is vital to the integrity of the criminal justice system, and particularly the capital process. And the *amici* are convinced that that restoration can only occur when there is a steadfast commitment to ensuring that the execution of a judicial order -- particularly an order that a criminal defendant be put to death --

must never be the product of judicial corruption.

The *amici* are:

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Fredrick H. Bates	Partner: Albert Bates Whitehead & McGaugh; President of the Cook County Bar Association
Robert W. Bennett	Professor of Law and former Dean, Northwestern University School of Law
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[1] Law School, law firm and other institutional affiliations are included only for purposes of identification. The views expressed in this brief are those of the individuals and not necessarily those of any institutions with which the individuals are or have been affiliated.

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SUMMARY OF THE ARGUMENT

Petitioner William Bracy has made a substantial showing that judicial corruption may have tainted the conviction and death

sentence imposed upon him following jury proceedings presided over by Thomas J. Maloney, who has since been convicted of federal racketeering charges. There is "good cause" -- and public necessity -- for discovery to assess whether Maloney's corruption infected Bracy's trial and sentencing.

Bracy demonstrates persuasively that Maloney was prejudiced against defendants who did not pay him money. Maloney had strong incentives to facilitate convictions of non-paying defendants in order: (1) to divert suspicion that might otherwise be aroused by acquittals Maloney was paid to render in other cases; (2) to increase the incentive for defendants to pay money in cases assigned to him; and (3) to cultivate a "law and order" image and thereby ensure his electability.

Because of the substantial risk that prejudice infected Bracy's trial, it is imperative that Bracy have the opportunity to pursue discovery -- if for no other reason than to lay to rest the gravely unsettling possibility that Bracy's trial and capital sentence were tainted by judicial corruption. Rule 6 of the Federal Rules governing § 2254 cases, allows discovery where there is "good cause." No right is more essential to the notion of a fair trial and due process than the right to have a trial before an unbiased, impartial judge. Bracy has made an ample showing that Maloney likely did not fulfill that function in his case. With a fully developed record, there is reason to believe that Maloney's prejudice and the violation of Bracy's due process rights will be apparent. Thus, the opportunity for discovery is mandated.

There must be zero tolerance for the venality that Maloney practiced in his years on the bench. The Court should not hesitate to authorize a full development of the facts as to

whether and how Maloney's corruption infected Bracy's trial. Anything less would reflect an unacceptable indifference to Maloney's radical and absolute departure from every principle for which our judicial system stands. Anything less would exacerbate the erosion of public confidence in the Illinois court system that Maloney's corruption has already produced.

ARGUMENT

I. THERE IS NEED FOR AN INQUIRY INTO WHETHER THOMAS J. MALONEY'S CORRUPTION INFECTED BRACY'S TRIAL.

A. Corruption permeated Maloney's career, including the period of Bracy's trial.

William Bracy was convicted of murder and other crimes and was sentenced to death in 1981 following jury proceedings presided over by Thomas J. Maloney, a former judge of the Cook County, Illinois Circuit Court. Maloney, in turn, was convicted in 1993 of the federal crimes of racketeering, extortion under color of official right and obstruction of justice, for which he is now serving a prison term of nearly sixteen years.

By any measure, Maloney's misconduct was staggering. In 1981 -- the very year in which he presided over Bracy's trial -- Maloney was found by his federal jury to have received an undetermined portion of a $100,000.00 payment to acquit three New York gang members of murdering a rival in Chicago's Chinatown. See United States v. Maloney, 71 F.3d 645, 650 (7th Cir. 1995). The year following Bracy's conviction -- 1982 -- Maloney accepted between $4,000.00 and $5,000.00 to convict a defendant of voluntary manslaughter rather than felony

murder and, in a separate case, accepted approximately $3,000.00 to sentence a defendant to probation instead of a prison sentence. Id. at 650-51. Maloney was also convicted of accepting $10,000.00 to acquit two members of the El Rukn street gang charged with a double murder in 1985 and then giving the money back when he perceived (correctly) that the FBI was investigating him. Id. at 651.

These federal convictions only scratched the surface of Maloney's corruption. At Maloney's trial, government witnesses testified about other cases in which Maloney had taken money, but which were not charged in the federal indictment. See id. at 649-52. Based on evidence presented at sentencing, United States District Judge Harry D. Leinenweber found that as a lawyer, prior to his election to the bench, Maloney cooperated in procuring the acquittal of reputed mob hitman Harry Aleman by Judge Frank Wilson in 1977.[2] Another witness testified that Maloney helped him evade a series of criminal charges by bribing judges as early as the late 1960's. Thus, "by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he practiced at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the $10,000.00 bribe he had accepted in the El Rukn prosecution." Bracy v. Gramley, 81 F.3d 684, 696 (7th Cir. 1996) (Rovner, J., dissenting).

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[2] The Illinois Appellate Court recently held that Aleman's putative "acquittal" was insufficient to trigger the protection of the Double Jeopardy Clause because Aleman, under the circumstances, had never actually been in jeopardy of conviction. See People v. Aleman, 281 Ill. App. 3d 991, 667 N.E. 2d 215 (1996), cert. denied, 1996 WL 745063 (February 18, 1997).

Maloney hid his shocking corruption under his judicial robes. However, at his federal trial he was exposed as a criminal who, a federal jury found, "transformed his very office into a racketeering enterprise." Id. at 699. Judge Rovner aptly characterized the dissonance between appearance and reality in Maloney's courtroom: "We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver Wendell Holmes." Id. at 700.

It is, as the majority below recognized, plausible to infer that Maloney's corruption "permeate[d] his judicial conduct" and was not "encapsulated in the particular cases in which he [took] bribes." See id. at 689. In fact, any other inference would ignore Maloney's fundamental departure from propriety and justice. "Once he embarked on the path of bribe taking, Maloney abandoned his judicial oath. Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not . . .momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench." Id. at 699-700 (Rovner, J., dissenting).

B. There is direct evidence showing that Maloney was especially tough on defendants who did not pay money.

Bracy does not contend that Maloney sought to extort money from him in his case. However, Bracy demonstrates convincingly that Maloney was prejudiced against defendants in cases where money was not paid. This prejudice denied fair trials to defendants who did not pay Maloney money. First,

Maloney had to facilitate convictions of non-paying defendants in order to divert suspicion that might otherwise be aroused by the acquittals Maloney had been paid to render. Second, a harsh, pro-State bias, which Maloney often exhibited, would increase the incentive for defendants to pay money in cases assigned to Maloney's courtroom. And third, Maloney needed to present a "law and order" image to ensure his electability even while he broke the law with impunity.

There was evidence at Maloney's federal trial that demonstrates that Maloney's corruption may have affected numerous defendants. William Swano, a corrupt defense attorney who cooperated with the federal investigation of Maloney, testified that he paid money to Maloney on a number of occasions. He testified that in 1985 he represented James Davis, who was charged with armed robbery. Davis's case was assigned to Maloney. The evidence against Davis was weak: the three witnesses to the robbery knew the two perpetrators and said Davis was not one of them; the victim confessed uncertainty about the identity of the offender; and Davis himself had an alibi. Under the circumstances, Swano was confident that "[t]he case was a not guilty in any courtroom in the building." Swano tried the case to Maloney without a jury. Though Swano paid Maloney on prior occasions, Swano did not pay Maloney in this case. Davis was convicted. Swano testified that he took this result as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Bracy v. Gramley, 81 F.3d at 697, citing United States v. Maloney, 1994 WL 96673, No. 91 CR 477, 3/24/93 Tr. at 2528, 2530.

Throughout his tenure on the bench, Maloney was widely feared among the defense bar as a severe, prosecution-minded judge -- a fact that rendered his 1991 indictment a stunning

surprise. That Maloney purposefully cultivated that image became clear at the sentencing hearing in his case, when, during a lengthy allocution, Maloney boasted about the number of defendants he had convicted -- going so far as to specifically mention Bracy's case. See United States v. Maloney, No. 91 CR 477, 7/21/94 Tr. at 607. Maloney's need to maintain appearances through a law and order veneer must have predisposed Maloney against non-paying defendants, particularly in high profile capital cases like Bracy's.

C. There is "good cause" for discovery in this case.

Before a habeas petitioner may engage in discovery, he must demonstrate "good cause." See Rule 6 of the Federal Rules Governing § 2254 cases. The commentary to Rule 6 provides: "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." The lower courts have uniformly held that denial of discovery is an abuse of discretion where the discovery is "indispensable to a fair, rounded development of material facts." East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1996) (citations omitted). See also Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996) (citations omitted).

Bracy satisfies the requirements for discovery under Habeas Rule 6. First, there is no serious question that, if Maloney were found to have been prejudiced against Bracy, it would follow that Bracy is "confined illegally" and "entitled to relief." "Trial before 'an unbiased judge' is essential to due

process." Johnson v. Mississippi, 403 U.S. 212, 216 (1971), citing Bloom v. Illinois, 391 U.S. 194, 205 (1968); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

"No right is more fundamental to the notion of a fair trial than the right to an impartial judge." Bracy v. Gramley, 81 F.3d at 696 (Rovner, J., dissenting) (citing Johnson, 403 U.S. at 216; In re Murchison, 349 U.S. 133, 136 (1955); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927)). As Judge Rovner stated in her dissent, our federal and state constitutions "promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted." Bracy v. Gramley, 81 F.3d at 696.

Second, Bracy has made specific allegations from which there is reason to believe that, if the facts were fully developed, Maloney's bias -- and the violation of Bracy's due process rights -- would be apparent. It is clear that Maloney's corruption was probably not limited to the particular cases in which money was exchanged for an acquittal. The evidence against Maloney demonstrated that he was a criminally oriented person for whom the concept of justice was fundamentally irrelevant. Bracy has amply demonstrated that Maloney had every reason to be unnecessarily and dramatically harsh in cases like Bracy's in which he had not received money.

Maloney had numerous opportunities in the course of Bracy's case to influence the outcome of the proceedings. For example, in Bracy's trial Maloney denied a defense motion to suppress certain seized evidence, ruling that the state's witnesses were more credible than the defense witnesses regarding the

circumstances of the seizure. The Illinois Supreme Court, applying settled law, -- and writing in 1985 when Maloney's corruption was unknown to all but his cohorts and those investigating his crimes -- refused to second guess Maloney's credibility findings. See People v. Collins, 106 Ill. 2d 237, 264, 478 N.E.2d 267, 278-79 (1985).

Maloney's ability to influence the perceived credibility of witnesses in his courtroom was enormous. For example, Maloney allowed the state wide latitude in its cross examination of certain defense witnesses. Those rulings were not disturbed by the Illinois Supreme Court on appeal, because "[t]he latitude to be allowed on cross examination . . . is a matter within the sound discretion of the trial court . . ." Id. at 268-69, 478 N.E.2d at 280-81. In Bracy's case, these rulings were of enormous significance, because, as the Illinois Supreme Court noted, the jury's "resolution of the defendants' guilt or innocence depended on the credibility of the witnesses and the weight given to their testimony." Id. at 261, 478 N.E.2d at 277.

Maloney made a host of other discretionary rulings during Bracy's case, all of which, as Maloney surely would have known, were virtually immune from appellate review. For example, Maloney excused a potential juror for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), based upon the juror's wholly ambiguous response to a question regarding willingness to impose the death penalty. See id. at 279-80, 478 N.E.2d at 286. Maloney denied the defense a continuance between the guilt and the sentencing phases of Bracy's trial, rejecting the defense argument that it needed time to investigate other crimes evidence that the State intended to introduce in aggravation. See id. at 280, 478 N.E.2d at 286-87.

The fact that Maloney appeared not to have abused his discretion with respect to any of these rulings scarcely proves lack of prejudice. To the contrary, as Judge Rovner pointed out in her dissent below: "A judge who wishes to be tough need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts he could hang his hat on . . . ; and we have no reason to doubt that if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge." Bracy v. Gramley, 81 F.3d at 698-99.

The discovery that Bracy sought in the District Court was limited and narrowly tailored to address the question of whether Maloney's pervasive and calculated corruption infected Bracy's proceedings. Bracy sought to subpoena investigative files in the possession of the United States Attorney and to depose witnesses, including Swano, familiar with Maloney's corrupt practices. That discovery could lead to other evidence confirming Swano's testimony about the fortunes of defendants who did not pay money in Maloney's courtroom. It could yield data that would indicate patterns of convictions and acquittals at the time of Bracy's trial and sentencing. The discovery might even reveal that there was additional, uncharged misconduct by Maloney closely connected in time to the Bracy proceedings.

Allowing Bracy his discovery is a small price to pay to achieve a critically important end. Only with a full and complete inquiry can we be certain that an Illinois death sentence will not be carried out against a person whose trial was fundamentally tainted and unfair.

II. THE COURT SHOULD GRANT RELIEF IN THIS CASE IN ORDER TO PROTECT THE INTEGRITY OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM.

The issue presented by the Court's grant of certiorari in this case is a matter of particular concern to those of us who practice law in the State of Illinois and to the citizens of our State. We have the unfortunate distinction to be the only United States jurisdiction in which a judge has been convicted of taking money for acquittals in capital murder cases. See "Month by Month: The Year That Was," National Law Journal, p. C2 (December 26, 1994).

Maloney's conduct, undoubtedly singular in callous disregard for the victims of crimes, for the families of victims and the very concept of justice, was nonetheless, it is well known, not the only instance of judicial corruption in Cook County, Illinois. Within the last decade, a total of 18 Cook County Circuit Judges have been convicted of crimes connected to the performance of their duties. See William Grady, "50 picked to study state court reform," Chicago Tribune, Chicagoland p.3 (January 9, 1992); see also "Chicago's Hall of Infamy," Chicago Sun-Times News p. 6 (April 29, 1994) (listing aldermen and judges convicted on corruption charges since 1979).

Maloney's indictment and subsequent conviction had a particularly negative impact on the public confidence in the Illinois justice system. As Judge Leinenweber said at Maloney's sentencing hearing, Maloney's unconscionable conduct has caused damage to the public "like dropping a bomb in the ocean" because of all the "ripples." Judge Leinenweber called Maloney's release of murderers "atrocious." In addition,

commenting on the "damage to the system," Judge Leinenweber added, "To know that dangerous criminals have been given a pass, certainly, doesn't help the public in its view of the crime problem." United States v. Maloney, No. 91 CR 477, July 21, 1994 Tr. at 631.

Moreover, Maloney's corruption persisted even after the announcement of the indictment of other members of the Illinois judiciary as a result of the federal Operation Greylord investigation. Thus, Maloney displayed a particular disrespect for the system and an "unbridled arrogance." See John Flynn Rooney, "Conviction of former judge Maloney sets a new low-water mark in court corruption," Chicago Daily Law Bulletin, p. 1 (April 19, 1993).

In recent years, the public has lost a substantial degree of its confidence in the Illinois court system. Public dismay at the condition of justice in Illinois has found ample expression in the Illinois media. See, e.g., Andrew Grene, "Courts, legal community faulted for shortcomings in '93," Chicago Daily Law Bulletin, p. 1 (January 3, 1994) ("Over the past 12 months, the justice system itself often seemed to be on trial in Illinois."); Tom McNamee, "Cost of a Wall: What else could $150,000 buy? Ask around." Chicago Sun-Times, News p. 4 (June 6, 1993) ("For $150,000, some cynics suggest, Chicagoans in the know could fix about 3,000 traffic tickets, bribe 1,500 building inspectors -- or fix 30 murder trials -- at $5,000 a crack."); Rosalind Rossi, "Maloney Jurors say Verdict is Message," Chicago Sun-Times, p. 4 (April 18, 1993) ("We all agreed that this is the message we wanted to send: 'We want honest people in office' said juror Marion Morel. . . .These offices are too high to have crooks in them.").

Much has been done to combat this erosion of public confidence. The indictment and conviction of Maloney and others prompted reform efforts, including the creation of a Special Commission of the Illinois Supreme Court to study ways in which judicial reform should occur. See John Flynn Rooney, "Courts Panel Plans to Form Task Forces," Chicago Daily Law Bulletin, p. 1 (January 9, 1992); William Grady, "50 picked to study state court reform," Chicago Tribune, Chicagoland p. 3 (January 9, 1992).

In addition, the daily work of the vast majority of the members of the Illinois judiciary, who are diligent, capable and honest, goes a long way toward restoring confidence among the public in the decency and integrity of the Illinois judiciary.

Nevertheless, the only sure way to restore faith in the integrity of our judiciary is to adhere steadfastly to a position of zero tolerance for judicial corruption. Bracy has raised a substantial claim that his conviction and death sentence were infected by Maloney's corruption and bias. Failure to permit discovery into the impact on Bracy of Maloney's misconduct would constitute an unacceptable tolerance for corruption. In this matter, the Court must eschew indifference. Not only Bracy, but the citizens of Illinois have the right to an inquiry into whether and how Maloney's criminality tainted this trial and death sentence.

Judge Rovner's dissent captured why discovery is vital in this case: "We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his

own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts." Bracy, 81 F.3d at 704 (Rovner, J. dissenting).

Bracy should be permitted to pursue discovery to determine whether Maloney's criminality tainted his conviction and sentence of death.

III. RELIEF IN THIS CASE IS ESSENTIAL TO THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS AND WOULD NOT IMPOSE A SIGNIFICANT BURDEN ON THE STATE.

At stake in Bracy's case is integrity -- and the perception of integrity -- in the capital sentencing process. Where the ultimate, irreversible penalty is to be imposed, it is simply unacceptable to fail to investigate by any and all appropriate means whether contemporaneous judicial criminality tainted the proceedings. The penalty of death is "qualitatively different" from any other penalty. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because of this fact, special care must be taken to ensure that the sentence of death was, and appears to the pubic to have been, imposed by a fair and impartial tribunal. Authorizing Bracy's discovery is essential to this objective.

The cost of allowing Bracy's discovery is minimal. Maloney is the only judge in the United States ever to have been convicted of corruption at the same time he presided over capital cases. There is only a handful of capital sentences imposed in Maloney's courtroom that are now under review in the Illinois state and federal courts. Accordingly, no significant burden

would be imposed on the State if discovery were allowed in these exceptional circumstances.

We in Illinois are particularly sensitive to the importance of a capital sentencing process that is and appears to be fair and reliable. We have witnessed the release of seven Death Row inmates in the last nine years on the ground of actual innocence of the crimes for which they were sentenced to death. See Ken Armstrong, "Bars to Justice: In A System Ravenous For Convictions Sometimes The Innocent Don't Walk," Chicago Tribune, Perspective, p. 1 (June 23, 1996). Just as it is intolerable to execute an innocent person, it is intolerable that a person wrongfully convicted because of Maloney's abhorrent behavior could be sent to his death. The minimum safeguard of allowing discovery into the facts is essential.

CONCLUSION

For the reasons set forth in this brief, the Concerned Illinois Lawyers and Law Professors request the Court to reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February 19, 1997

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Re: Bracy v. Gramley
96-6133

Dear Mr. Geraghty:

This is to confirm that I consent to the filing of an amicus curiae brief by the Concerned Illinois Lawyers and Law Professors on behalf of petitioner in the above-entitled matter.

Sincerely,

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February 18, 1997

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Re: Bracy v. Gramley
U.S. Supreme Court Number 96-6133

Dear Mr. Geraghty:

This is to confirm that I consent to the filing of the amicus curiae brief by you and the other amici on behalf of my client, William Bracy.

Sincerely,

Gilbert H. Levy

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c: William Bracy

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